comment period provided for streamlined applications.[228] We reiterate that Executive Branch agencies are not required to overcome a "strong presumption" in favor of granting these requests. Nevertheless, as discussed above, we expect that such concerns will be raised only in very rare circumstances.[229] Furthermore, applicants can expect in almost all cases that the International Bureau will issue a decision on their requests within the streamlined processing period.[230]

114. We accordingly retain our general requirement that licensees seek Commission approval before they accept indirect foreign ownership that would put them over Section 310(b)(4)'s 25 percent benchmark. For the same reasons, we will also continue to require licensees who have already received approval to exceed the 25 percent benchmark up to a certain level of indirect foreign ownership to seek further Commission approval in order to increase that level of indirect foreign ownership. We accept the FBI's assertion that the increases in foreign ownership or influence may present concerns that Executive Branch agencies may need an opportunity to evaluate before we allow an increased level of foreign ownership. In any event, we expect that in the future most applicants will seek authorization to accept indirect foreign investment up to any non-controlling level when they initially file, so maintaining this requirement will not impose a significant burden on applicants or the Commission.

115. Because we find that we must retain a procedure for prior approval of indirect foreign investment in excess of 25 percent, we decline to adopt the proposal advocated by Telephone and Data Systems to disregard investments by non-carriers held as publicly traded securities. We accept the concerns of Executive Branch agencies that even small investments in publicly traded securities could, if aggregated, nevertheless create a degree of control or influence over a licensee that would be contrary to U.S. national security or law enforcement interests.[231] When applicants and licensees seek Commission approval under Section 310(b)(4) for a particular amount of indirect foreign ownership, they should indicate how much of that amount is attributable to each identified shareholder and how much of that amount is an allowance for fluctuations in publicly traded shares.

116. We will continue to use the "principal place of business" test to determine the nationality or "home market" of foreign investors.[232] No commenter suggested an alternative test or argued that the test was inappropriate. We will also consider other means of determining an applicant's nationality if requested to do so by an applicant or if so advised by the Executive Branch. For the reasons

228 47 C.F.R. § 63.20(c), (d).

229 *See supra* Section III.A.2.b.

230 *See infra* ¶ 327.

231 *See* Letter from John F. Lewis, Jr., Assistant Director in Charge, National Security Division, Federal Bureau of Investigation, to Regina M. Keeney, Chief, International Bureau, FCC (Oct. 31, 1997); *Ex Parte* Presentation of the Secretary of Defense (filed Oct. 16, 1997) at 2-3.

232 *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3948-52 ¶¶ 199-208.

discussed above,[233] we will not inquire into the extent or implementation of a WTO Member country's commitment in determining whether to apply our open entry policies to an investor with its home market in that country.

117. We agree with SITA that some aeronautical enroute and aeronautical fixed services[234] are basic telecommunications services that fall within the class of services covered by the WTO Basic Telecom Agreement. Contrary to ARINC's assertions, the WTO Basic Telecom Agreement encompasses both private and commercial telecommunications services. Most WTO Members, including the United States, committed to provide market access to "mobile services," of which aeronautical enroute and fixed services is a subset. We accordingly conclude that we should apply the same standard to those services that we apply to other basic telecommunications services under Section 310(b)(4) and not apply an ECO test to indirect foreign ownership by entities from WTO Member countries. As in other contexts, we believe that participation by a foreign entity may create additional competition in aeronautical services. Consideration of whether a particular investment presents a very high risk to competition and other public interest factors, including input from Executive Branch agencies regarding matters uniquely within their expertise, will be sufficient to protect the public interest. We will therefore apply the standard developed above for indirect foreign ownership of common carrier radio licensees to indirect foreign ownership of aeronautical services.

118. We decline, in this proceeding, to address the rule limiting the number of aeronautical enroute licenses to one per location.[235] That rule is beyond the scope of this proceeding. The *Notice* raised only the issue of whether to continue our *ad hoc* approach to analyzing indirect foreign investment in aeronautical enroute and aeronautical fixed licensees pursuant to Section 310(b)(4).[236] Because the service-specific licensing rules were not discussed in the *Notice*, we are concerned that critical parties such as the Federal Aviation Administration have not had sufficient opportunity to provide the input that we would need before we were to reconsider our licensing rules. However, we conclude that the issue should be explored in a separate proceeding, in which we would solicit the input of all members of the air transport industry and appropriate U.S. Government agencies. We will commence such a proceeding in the near future. In the meantime, SITA and other entities seeking to provide aeronautical services in the United States may apply for unencumbered enroute spectrum under the Commission's existing rules and seek rule waivers, as necessary, to provide service in areas where another entity is already licensed.

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[233] *See supra* ¶¶ 37-39.

[234] Aeronautical enroute and aeronautical fixed stations provide communications for the operational control of aircraft by aircraft operating companies. Communications relate to safe, efficient, and economical operation of aircraft. Typical messages concern aircraft performance, fuel, weather, position reports, and essential services and supplies. Public correspondence (e.g., private or personal messages of passengers or crew) is not permitted. 47 C.F.R. §§ 87.261, 87.275.

[235] 47 C.F.R. § 87.261(c).

[236] *See Notice* ¶ 70.

IV. Policies toward Non-WTO Members

A. Application of ECO Analysis

Background

119. We tentatively concluded in the *Notice* that, with respect to non-WTO Member countries, we would not change our policies of applying an ECO test for Section 214 authorizations, cable landing licenses, Section 310(b)(4) authorizations, and petitions to approve alternative settlement arrangements.[237] In each case, we tentatively concluded that the circumstances that existed when we adopted the *Foreign Carrier Entry Order* in 1995 and the *Flexibility Order* in 1996 had not changed sufficiently with respect to countries that are not Members of the WTO, as they had for countries that are WTO Members. We also sought comment on whether the ECO test should be modified.[238]

120. In addition, we tentatively concluded that our equivalency test would continue to be necessary to prevent one-way bypass of the accounting rate system between the United States and non-WTO Member countries. Although we expect liberalization of the international services markets of WTO Member countries to increase pressure on non-WTO Member countries to reform their telecommunications markets and their accounting rates, we stated that we were not confident that the reform would come quickly or broadly enough to outweigh the need to maintain the equivalency standard.

Positions of the Parties

121. Most parties that addressed the issue agree that we should continue to apply the ECO test to non-WTO countries.[239] BTNA and WorldCom support applying the ECO test to applicants from non-WTO Member countries in order to advance the goals of the Commission's competitive policies and in the expectation that bilateral pressures may serve to create incentives for those countries to join the WTO, make market opening commitments, and adopt the Reference Paper.[240]

122. Sprint favors elimination of the ECO test even as applied to non-WTO Member countries. Sprint argues that the ECO test is unworkable and impractical and that we should base our policies only on protecting competition in the U.S. market. Sprint argues that it would be incongruous

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[237] *Notice* ¶¶ 53-59, 65-66, 77, 154.

[238] *Notice* ¶ 56; *see* Telefónica Larga Distancia de Puerto Rico Petition for Reconsideration of the *Foreign Carrier Entry Order* (filed Jan. 29, 1996) (TLD Petition); TLD Reply to Oppositions to Petition for Reconsideration (filed Mar. 11, 1996) (TLD Reply).

[239] AT&T Comments at 41; BTNA Comments at 6; MCI Comments at 9; New T&T Hong Kong Comments ¶ 4.1; WorldCom Comments at 8-9.

[240] BTNA Comments at 6; WorldCom Comments at 9.

to deny an application from a carrier in a non-WTO Member country because it fails ECO, even though the country's telecommunications market is more competitive than the markets of some WTO Members.[241] Applications that pose similar degrees of harm to competition should be conditioned similarly, Sprint argues, whether or not the countries involved are WTO Members.[242] FaciliCom similarly opposes the continued use of the ECO test because it is too inflexible. FaciliCom favors evaluation of a flexible set of public interest factors and use of conditional authorizations depending on the special circumstances of each country.[243]

123. WorldCom argues that the equivalency test is necessary to protect against one-way bypass into the United States from non-WTO Member countries and that the equivalency test creates an incentive for those countries to join the WTO, make market opening commitments, and adopt the Reference Paper.[244] Sprint, however, opposes retaining the equivalency test because our settlement rate benchmark condition may effectively eliminate the potential for discrimination by a dominant foreign carrier.[245] Viatel urges the Commission to consider restricting application of the equivalency test to carriers affiliated with foreign carriers that have market power in the destination country because one-way bypass is a significant threat only from those carriers.[246]

Discussion

124. We conclude that the circumstances that existed when we adopted the *Foreign Carrier Entry Order* and the *Flexibility Order* have not changed sufficiently with respect to countries that are not Members of the WTO. It continues to serve the goals of our international telecommunications policy[247] to apply the ECO and equivalency tests in the context of non-WTO Member countries.

125. We do not agree with Sprint's arguments that our sole focus in this context should be on the potential harm to competition in the U.S. markets. It continues to serve the public interest to maintain policies directed at encouraging non-WTO Member countries to open their telecommunications markets to competition. Since 1995, our application of the ECO test has provided incentives for foreign governments to allow U.S. participation in their markets, and it played a part in the WTO negotiations that resulted in the Basic Telecom Agreement. We believe that continuing to apply the ECO test to non-WTO Member countries may encourage some of those countries to take

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[241] Sprint Comments at 3-6.

[242] *Id.* at 3, 6, 15, 17.

[243] FaciliCom Comments at 6-7.

[244] WorldCom Comments at 8-9; *see also* MCI Comments at 9.

[245] Sprint Comments at 13 n.14.

[246] Viatel Comments at 10.

[247] *See supra* ¶ 11.

unilateral or bilateral steps toward opening their markets to competition and may provide incentives for them to join the WTO.

126. It is not incongruous to apply different standards to countries that are WTO Members and countries that are not. Members of the WTO, whether or not they made commitments on basic telecommunications, are bound by general GATS obligations, including the MFN obligation.[248] Furthermore, WTO Members are committed to the progressive liberalization of trade. We therefore expect that WTO Members will either unilaterally or multilaterally liberalize their markets, and when they do so, they will be obligated not to discriminate against U.S. service providers. Carriers from WTO Member countries therefore present, as a group, less of a concern with anticompetitive conduct.

127. By contrast, the markets of non-WTO Members, in almost all cases, are not liberalized,[249] so they are far more likely than WTO Members to present anticompetitive concerns that would dictate continued application of the ECO test. Moreover, even those non-WTO Members that do liberalize their markets are not bound by international commitments to do so; thus, there is no external assurance that their markets will continue to be open, in terms of both legal and practical barriers to entry. In addition, for non-WTO Members there is far greater reason to continue to apply the ECO test as a means of encouraging them to open their markets to competition and join the WTO. Finally, we observe that the United States owes no international trade obligations to most non-WTO Members, so there is no obligation under the WTO Basic Telecom Agreement to adopt the same approach for these countries as for WTO Members.

128. In the case of Section 214 applications to provide facilities-based, resold switched, and resold non-interconnected private line services, we will continue to apply the ECO test as part of the public interest inquiry when presented with an application from a foreign carrier or a carrier affiliated with a foreign carrier where the foreign carrier is from a non-WTO Member country and has market power in the destination market. We define market power in this context the same way that we define it in the context of our regulations prohibiting any carrier from accepting certain "special concessions" from foreign carriers with market power.[250]

129. We also conclude, for the reasons discussed above, that it remains important to maintain the equivalency test as part of our standard for permitting the provision of switched services over

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[248] *See* GATS art. VI.

[249] We recognize that there are some exceptions, such as the Russian Federation and Taiwan, which have taken steps toward liberalization despite not being Members of the WTO.

[250] *See infra* Section V.B.1.

private lines, whether facilities-based or through resale, for non-WTO Member countries.[251] Therefore, for non-WTO Member countries, it remains necessary to allow the provision of switched services over private lines only when the foreign country provides equivalent resale opportunities.

130. We also conclude, for the reasons discussed above, that we will continue to apply an ECO test in this context as part of our analysis under Section 2 of the Submarine Cable Landing License Act.[252] Thus, when considering an application to land and operate a submarine cable that will connect to a non-WTO Member country, we will consider whether the applicant is or is affiliated with a carrier that has market power in the destination market of the cable, and if so, we will consider whether that destination market offers effective opportunities for U.S. companies to land and operate a submarine cable in that country. We will also continue to consider, in addition to the *de jure* and *de facto* ECO criteria, other factors consistent with our discretion under the Submarine Cable Landing License Act that may weigh in favor of or against grant of a license.

131. We will also continue to apply the ECO test as part of our general public interest analysis under Section 310(b)(4) regarding foreign investment by entities from non-WTO Member countries in common carrier radio licensees. We conclude that our goals of increasing competition and opening foreign markets would continue to be served by opening the U.S. market to investors from non-WTO Member countries only to the extent that the investors' home markets are open to U.S. investors.[253] We will deny an application if we find that more than 25 percent of the ownership of an entity that controls a common carrier radio licensee is attributable to parties whose principal place(s) of business are in non-WTO Member countries that do not offer effective competitive opportunities to U.S. investors in the particular service sector in which the applicant seeks to compete in the U.S. market, unless other public interest considerations outweigh that finding.

132. Finally, we adopt our proposal to retain the ECO test as the threshold standard for permitting accounting rate flexibility with carriers from countries that are not WTO Members. As we said in the *Notice* and in the *Flexibility Order*, the ECO test provides the best indicator of whether the legal, regulatory, and economic conditions in a foreign market support competition such that our International Settlements Policy is no longer necessary to protect against abuse of market power by foreign carriers. Because non-WTO Member countries are not necessarily subject to the market forces and GATS obligations to which WTO Members are subject and the United States owes them no

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[251] In the *Benchmarks Order*, we also adopted the requirement that settlement rates for at least 50 percent of the U.S. settled traffic on the relevant route be at or below the benchmark rate. *See Benchmarks Order* ¶¶ 242-259. We here amend Sections 63.17, 63.18, and 63.21 to implement these policy changes. *See infra* Appendix C (to be codified at 47 C.F.R. §§ 63.17, 63.18, 63.21).

[252] Submarine Cable Landing License Act § 2, 47 U.S.C. § 35. That provision gives us discretion to deny an application if to do so would "assist in securing rights for the landing or operation of cables in foreign countries, or in maintaining the rights or interests of the United States or of its citizens in foreign countries, or will promote the security of the United States."

[253] *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3944 ¶ 186.

international obligation, we find that it would not serve the public interest to remove the ECO test as applied to those countries.

B. Modification of Contexts in Which ECO Analysis Applies

Background

133. In the *Foreign Carrier Entry Order*, we decided not to apply the ECO test to U.S. carrier interests in foreign carriers.[254] We also decided, in the *Foreign Carrier Entry Order*, to apply the ECO test on routes where a carrier that has market power is controlled by or under common control with an otherwise-affiliated foreign carrier.[255] We found that such indirect investments by affiliated foreign carriers raise anticompetitive dangers equivalent to those raised by direct investments. Telefónica Larga Distancia de Puerto Rico (TLD) and BT North America (BTNA) sought reconsideration of these issues, and we dispose of those petitions here. In the *Notice* in this *Foreign Participation* proceeding, we noted the pendency of the petitions for reconsideration and sought comment on whether we should, for purposes of countries that are not WTO Members, apply the ECO test to U.S. carriers that own more than 25 percent of, or control, a foreign carrier from a non-WTO country.[256]

Positions of the Parties

134. TLD argues that we adopted an unjustifiable double standard in applying the ECO test to foreign carriers' interests in third-country carriers but not to U.S.-based carriers' interests in any foreign carriers. TLD argues primarily that we should not apply the ECO test to destination markets where the affiliation results only from an affiliated foreign carrier's control of a third country's dominant carrier.[257] The policy we adopted in the *Foreign Carrier Entry Order*, TLD argues, could discourage third countries from privatizing their telecommunications carriers and could discourage foreign carriers from participating in third countries' privatizations by taking away the possibility of carrying U.S. traffic to that third country. No developing country, TLD argues, will be able to privatize its telecommunications without offering a period of exclusivity. In its reply to oppositions to its petition, TLD proposes a narrower modification of our policy, suggesting that we should permit a foreign carrier to carry traffic on a route to a developing foreign country (despite its affiliate's exclusivity)

254 *See id.* at 3912-13 ¶¶ 103-106.

255 *See id.* at 3906 ¶ 87.

256 *Notice* ¶ 57.

257 Telefónica Larga Distancia de Puerto Rico, Inc., Petition for Reconsideration (IB Docket No. 95-22). TLD does not formally request reconsideration of our decision in the *Foreign Carrier Entry Order* to apply an ECO test to the destination market of a foreign carrier that has a greater-than-25-percent interest in a U.S. carrier. Although TLD opposed adoption of an ECO test for any foreign carrier entry, it requests reconsideration only of our decision to apply an ECO test to destination markets where a foreign carrier entrant's commonly controlled carriers have market power.

where (1) the developing country has privatized a substantial portion of its telecommunications carrier; (2) U.S. competitors have had an equal opportunity to participate in the privatization and obtain exclusivity; and (3) a date certain is set to introduce effective competition.

135. Alternatively, TLD argues that we must apply the ECO test to U.S. carriers' investments in foreign carriers. It contends that our concerns with the potential for anticompetitive conduct are equally raised by U.S. carrier investments in foreign carriers and that treating U.S. carrier investments in foreign carriers differently from foreign carrier investments in third countries' carriers violates the Due Process Clause of the Fifth Amendment. Allowing U.S. companies to acquire controlling interests in foreign carriers without being subject to the ECO test, TLD contends, gives U.S. carriers an unfair and unjustified advantage in bidding on privatizations. U.S. carriers would value those third countries' carriers higher because they would be allowed to carry U.S. traffic to that country. The distinction, TLD argues, cannot be rationally justified by our goals in these proceedings.

136. BTNA argues that the Commission may have underestimated the extent to which U.S. carrier investment in dominant foreign carriers raises anticompetitive concerns. It argues that we should address our concerns regarding possible discriminatory conduct relating to equity relationships between U.S. carriers and dominant foreign carriers without regard to whether the U.S. carrier or the foreign carrier is making the investment.[258] WorldCom supports the application of the ECO test to U.S. carriers that hold a 25 percent or greater interest in a foreign-carrier with market power from a non-WTO country. WorldCom states that the ECO test is appropriate because the potential for anticompetitive conduct is the same.[259]

137. In response, AT&T argues that the Commission was correct in determining that applying the ECO test to U.S. carriers' investments in foreign carriers would be unnecessary. AT&T states that it is unnecessary to apply the ECO test in those situations because U.S. carriers are subject to the Commission's jurisdiction, and to do so would decrease U.S. opportunities to invest abroad. AT&T argues that foreign carriers and investors have no equal protection rights to assert and that, even if they did, there would be no constitutional violation because the distinction between U.S. ownership and foreign ownership is fully justified. AT&T also opposes TLD's argument that we should not apply an ECO test to foreign carriers' interests in third-country carriers. AT&T argues that our main goal is liberalization, not just privatization, and that we should not encourage foreign carriers to pay premiums to get monopolies in third countries.[260]

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[258] BT North America Inc. Petition for Reconsideration (IB Docket No. 95-22) at 4-5.

[259] WorldCom Comments at 9.

[260] AT&T Corp. Opposition to Petitions for Reconsideration (IB Docket No. 95-22) at 9-13. MCI also opposed TLD's petition. MCI Telecommunications Corporation Opposition (IB Docket No. 95-22). TLD asks us to strike MCI's Opposition on the ground that it was not served upon TLD as required by Section 1.429(f) of the Commission's rules, 47 C.F.R. § 1.429(f). Because we do not rely upon any of MCI's assertions or arguments made in that filing, we need not rule on this request by TLD.

Discussion

138. We note at the outset that these issues are moot for the great majority of the world's telecommunications markets. They remain relevant only to those countries to which we will continue to apply our ECO test — i.e., to non-WTO countries, which accounted for less than five percent of the world's telecommunications revenues in 1995.

139. Upon reconsideration and in light of the record and developments in the global telecommunications market since we adopted the *Foreign Carrier Entry Order* in 1995, we modify the application of the ECO test as follows. We will henceforth apply the ECO test without regard to whether the applicant, or its affiliate, is a U.S. carrier. We will continue, however, to apply the ECO test to a route whenever a carrier or its foreign affiliate controls, is controlled by, or is under common control with a carrier that has market power in a destination market, where that destination market is a non-WTO country.

140. As we discuss below,[261] our primary competitive concern in this proceeding is preventing carriers that control bottleneck facilities in foreign countries from using those bottlenecks to discriminate against unaffiliated U.S. carriers. Our experience since adopting the *Foreign Carrier Entry Order* indicates that there can be significant risks to competition when a U.S. carrier owns a controlling interest in a foreign carrier with market power. Furthermore, we anticipate that, in the more liberalized environment that will result from the WTO Basic Telecom Agreement, it will become increasingly difficult to define a "U.S. carrier" for the purpose of distinguishing between U.S.-carrier and foreign-carrier ownership of carriers. In light of those difficulties, we can no longer rely on our greater ability to redress anticompetitive conduct by U.S. carriers as compared to foreign carriers. Moreover, the GATS principle of National Treatment[262] obligates the U.S. Government to treat investments by carriers from WTO Member countries no less favorably than it treats investments by domestic carriers. We therefore modify our conclusion in the *Foreign Carrier Entry Order* and conclude that we will apply the ECO test where a U.S. carrier, or a company that owns more than 25 percent of a U.S. carrier, owns a controlling interest in a foreign carrier that has market power in a non-WTO country.[263]

141. We disagree with TLD that it does not serve our purposes to apply the ECO test to third countries. When a foreign carrier that controls bottleneck facilities controls, is controlled by, or is under common control with a carrier that is affiliated with a U.S. carrier, there is a danger that the bottleneck facilities will be used to discriminate against unaffiliated U.S. carriers. For example, if we were to adopt TLD's primary proposal, the U.S. affiliate of a foreign carrier that enters various markets through wholly owned subsidiaries would be able to serve all of those subsidiaries' routes without application of the ECO test. The other subsidiaries would have the ability and incentive to use their

[261] *See infra* ¶¶ 145-149.

[262] *See infra* ¶ 338.

[263] *See infra* Appendix C (to be codified at 47 C.F.R. § 63.18(h)(5), (6)).

market power to discriminate against unaffiliated U.S. carriers by routing traffic in ways that take advantage of their market power.

142. Moreover, applying the ECO test to non-WTO countries will encourage non-WTO countries to open their markets to competition in addition to privatizing their telecommunications carriers. Because privatization without liberalization neither promotes competition nor reduces the risk of anticompetitive conduct, our goal is to encourage simultaneous privatization and liberalization. Developments in Guatemala, Chile, Brazil, and other countries indicate that the trend in privatizations is toward a very rapid transition to liberalization and procompetitive regulation. If the ECO test lowers the value of an exclusive arrangement in a privatization, it would thereby encourage simultaneous liberalization and privatization. Finally, our decision to apply the ECO test to U.S. carriers' investments in foreign carriers cures the alleged inequity cited by TLD.[264]

V. Regulatory Issues

A. Regulatory Approach

143. As noted above, we anticipate that the WTO Basic Telecom Agreement will spur competition across the globe and open foreign markets to U.S. carriers. Here in the United States, the open entry standard we adopt above will attract foreign entry into the U.S. market, to the benefit of U.S. consumers. Given our new open entry approach, the public interest mandates that we revisit the competitive safeguards governing foreign-affiliated carrier provision of basic telecommunications services in the U.S. market and, more broadly, U.S. carrier dealings with foreign carriers.[265] In particular, we examine our rules preventing the exercise of foreign market power in the U.S. market. The regulatory framework we establish here modifies or eliminates rules that could hamper competition. We adopt a targeted approach designed to monitor and detect anticompetitive behavior in the U.S. market without imposing regulations that are more burdensome than necessary. In determining which competitive safeguards are necessary, we first identify what concerns arise when U.S. carriers enter into arrangements with foreign carriers. Next, we address the appropriateness of our existing safeguards and those we proposed in the *Notice*.

[264] Although we decline to adopt the general rule that TLD proposes in its Reply to Oppositions to Petition for Reconsideration for supporting developing countries' privatization efforts, we note that an applicant could raise such considerations as additional public interest factors in a particular case.

[265] We use the term "U.S. carrier" to refer to any carrier authorized to provide U.S. international services pursuant to Section 214 of the Act, regardless of the nationality of the carrier's ownership. A "foreign carrier" is defined in Section 63.18(h)(1)(ii) of our rules as "any entity that is authorized within a foreign country to engage in the provision of international telecommunications services offered to the public in that country within the meaning of the International Telecommunication Regulations . . . which includes entities authorized to engage in the provision of domestic telecommunications services if such carriers have the ability to originate or terminate telecommunications services to or from points outside their country." 47 C.F.R. § 63.18(h)(1)(ii). We clarify here that we use the term "foreign carrier" regardless of national ownership. A "U.S. carrier," therefore, could refer to a wholly owned subsidiary of a foreign entity, while a "foreign carrier" could be a U.S.-owned entity.

144. Concerns about potential anticompetitive conduct generally are triggered where one party has sufficient market power to cause harm to competition and consumers in the U.S. market. Consistent with Commission precedent, we define market power as a carrier's ability to raise price by restricting its output of services.[266] A carrier can raise prices profitably and sustain them above competitive levels, and thereby exercise market power, in two ways.[267] First, a carrier may be able to raise service prices by restricting its own output of that service; second, a carrier may be able to raise prices by increasing its rivals' costs or restricting its rivals' output through the control of an input that is necessary for the provision of service.[268] Our general regulatory framework has long addressed the ability of carriers to engage in both types of behavior in the U.S. international services market.[269] We

[266] *See Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, FCC 97-142, ¶ 11 (rel. Apr. 18, 1997), *recon.*, FCC 97-229 (rel. June 27, 1997) (*LEC Regulatory Treatment Order*) (citing *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 83-481, Fourth Report and Order, 95 FCC 2d 554, 558 ¶ 7 (1983), *vacated*, *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied*, *MCI Telecommunications Corp. v. AT&T*, 509 U.S. 913, 13 S. Ct. 3020 (1993) (*Competitive Carrier Fourth Report and Order*)). In the *Competitive Carrier Fourth Report and Order*, the Commission defined market power alternatively as "the ability to raise prices by restricting output" and as "the ability to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable." *Competitive Carrier Fourth Report and Order*, 95 FCC 2d at 558 ¶ 7. The 1992 Department of Justice/Federal Trade Commission Merger Guidelines similarly define market power as "the ability profitably to maintain prices above competitive levels for a significant period of time." 1992 Department of Justice/Federal Trade Commission Merger Guidelines, 4 Trade Reg. Rep. (CCH) 20,569, 20,570; *see also LEC Regulatory Treatment Order* ¶ 11 n.26, ¶ 16 n.41.

[267] *See Notice* ¶ 88; *see also LEC Regulatory Treatment Order* ¶ 83.

[268] Economists have recognized these different ways to exercise market power by distinguishing between "Stiglerian" market power, which is the ability of a firm profitably to raise and sustain its price significantly above the competitive level by restricting its own output, and "Bainian" market power, which is the ability of a firm profitably to raise and sustain its price significantly above the competitive level by raising its rivals' costs, thereby causing the rivals to restrain their output. *See* Thomas G. Krattenmaker, Robert H. Lande, & Steven C. Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 Geo. L.J. 241, 249-53 (1987).

[269] We have imposed regulatory safeguards on carriers when they possess the ability to raise prices in the international services market by restricting their output of such services. *See International Competitive Carrier Policies*, CC Docket No. 85-107, Report and Order, 102 FCC 2d 812 (1985), *recon. denied*, 60 RR 2d 1435 (1986) (*International Competitive Carrier*); *see also LEC Regulatory Treatment Order*. Our rules also address the ability of a U.S. carrier with market power in the local exchange market to discriminate or otherwise act anticompetitively against its rivals in the U.S. international services market. *See International Competitive Carrier*, 102 FCC 2d 812; *LEC Regulatory Treatment Order*; *see also* 47 U.S.C. § 272; *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket No. 96-149, First Report and Order and Further

have found, however, that dealings with foreign carriers generally present concerns for the U.S. international services market that fall into the second category.[270] In the *Notice*, we noted that our concern regarding market power on the foreign end involves "the ability to act anticompetitively against unaffiliated U.S. carriers through the control of bottleneck services or facilities on the route in question."[271] We clarify that the regulatory framework we adopt here focuses in large part on dealings with foreign carriers that possess sufficient market power on the foreign end of a U.S. international route to affect competition adversely in the U.S. international services market. As we stated in the *Foreign Carrier Entry Order*, our regulatory concern involves the U.S. market for international telecommunications services, "*i.e.*, telecommunications services that originate or terminate in, or transit the United States . . . includ[ing] the U.S. market for global, seamless network services that increasingly are being used by U.S. businesses."[272] Our primary concern in this proceeding, however, involves the ability of U.S. carriers to terminate traffic on the foreign end of an international route.

145. Absent effective regulation in our market, we are concerned that a foreign carrier with market power in an input market on the foreign end of a U.S. international route has the ability to exercise, or leverage, that market power into the U.S. market to the detriment of competition and consumers. Firms with market power in an "upstream" input market can engage in discrimination in a "downstream" end-user market by favoring one downstream entity at the expense of its competitors.

Notice of Proposed Rulemaking, 11 FCC Rcd 21,905 (1996) (*Non-Accounting Safeguards Order*). We also have rules to prevent a carrier with market power on the foreign end of a U.S. international route from exercising that market power in the U.S. international services market. *See International Competitive Carrier*, 102 FCC 2d 812; *Regulation of International Common Carrier Services*, CC Docket No. 91-360, Report and Order, 7 FCC Rcd 7331 (1992) (*International Services Order*); *Foreign Carrier Entry Order*, 11 FCC Rcd 3873; *Implementation and Scope of the International Settlements Policy for Parallel Routes*, CC Docket No. 85-204, Report and Order, 51 Fed. Reg. 4736 (1986), *modified in part on recon.*, 2 FCC Rcd 1118 (1987), *further recon.*, 3 FCC Rcd 1614 (1988); *see also Regulation of International Accounting Rates*, 6 FCC Rcd 3552 (1991), *on recon.*, 7 FCC Rcd 8049 (1992); *Regulation of International Accounting Rates*, CC Docket No. 90-337, Phase II, Fourth Report and Order, 11 FCC Rcd 20,063 (Dec. 3, 1996) (*Flexibility Order*), *recon. pending*; *International Settlement Rates*, IB Docket No. 96-261, Report and Order, FCC 97-280 (rel. Aug. 18, 1997) (*Benchmarks Order*), *recon. pending*.

270 As we stated in the *Notice*, it is unlikely that a foreign carrier could possess sufficient market share in the U.S. international services market to raise price by restricting output of such service. *See Notice* ¶ 89. Given the competitiveness of the U.S. international services market, we believe this to be true whether the foreign carrier penetrates the U.S. market via new entry, investment or merger. Moreover, in the event that a foreign carrier would have the ability, upon entry or shortly thereafter, to raise the price of U.S. international service by restricting its own output, our domestic dominant carrier rules would apply. *See infra* note 434.

271 *See Notice* ¶ 6 (citing *Foreign Carrier Entry Order*, 11 FCC Rcd at 3917 ¶ 116).

272 *Foreign Carrier Entry Order*, 11 FCC Rcd at 3960-61 ¶ 230; *see also The Merger of MCI Communications Corporation and British Telecommunications plc*, GN Docket No. 96-245, Memorandum Opinion and Order, FCC 97-302, ¶¶ 56-57 (rel. Sept. 24, 1997) (*BT/MCI Merger Order*).

Where the upstream firm possesses market power, the downstream competitors have few, if any, alternative sources for the upstream input.[273] We find that the relevant input markets on the foreign end of a U.S. international route are the markets that involve services or facilities necessary for the provision of U.S. international services. These relevant markets generally include: international transport facilities or services, including cable landing station access and backhaul facilities; inter-city facilities or services; and local access facilities or services on the foreign end.[274] We are not persuaded by KDD's claim that, in examining foreign market power, we should consider only the control of *local exchange* facilities.[275] Nor are we convinced by GTE that our market power determinations should not consider the control of local exchange facilities in WTO Member countries.[276] Our concern extends to a carrier's control of any services or facilities market on the foreign end that could result in harm to competition in the U.S. market. We recognize that, for purposes of identifying the relevant geographic market for inter-city and local access facilities, it may be appropriate in some instances to examine a discrete geographic region rather than the national market of a foreign country.

146. We observed in the *BT/MCI Merger Order* that the exercise of foreign market power in the U.S. market could harm U.S. consumers through increases in prices, decreases in quality, or a reduction in alternatives in end-user markets.[277] More specifically, we discussed three anticompetitive strategies that could cause harm to competition in the downstream market: price discrimination, non-price discrimination, and price squeeze behavior. A foreign carrier with market power could engage in price discrimination by raising the price of the input to its downstream competitors, whether or not it raises the price to its own downstream partner (which, from the perspective of a fully integrated firm, pays economic cost regardless of the nominal transfer price of the input). A foreign carrier could

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[273] *See BT/MCI Merger Order* ¶¶ 39-40 (citing Thomas G. Krattenmaker, Richard H. Lande, and Steven C. Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 Geo. L.J. 241, 249-53 (1987); *LEC Regulatory Treatment Order* ¶ 83).

[274] *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3917 ¶ 116 ("'Bottleneck services or facilities' are those that are necessary for the provision of international services, including inter-city or local access facilities on the foreign end."); *BT/MCI Merger Order* ¶ 43 (identifying six input markets in its merger review: (1) international transport between the United States and United Kingdom; (2) U.K. cable landing station access; (3) U.K. backhaul; (4) U.K. inter-city transport; (5) U.K. terminating access services; and (6) U.K. originating access services).

[275] *See* KDD Comments at 13; KDD Reply Comments at 7.

[276] *See* GTE Comments at 10.

[277] *See BT/MCI Merger Order* ¶¶ 154-155 (citing Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 Yale L.J. 209 (Dec. 1986); *see also* A.B.A. Section of Antitrust Law, *Antitrust Law Developments*, 330-33 (3d ed. 1992); Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 Antitrust L.J. 513 (1995); Martin Perry, *Vertical Integration: Determinants and Effects, in The Handbook of Industrial Organization* 183 (Richard Schmalensee & Robert Willig eds., 1989)); *see also Notice* ¶ 90.

engage in non-price discrimination by delaying its delivery of the input product to U.S. rivals while continuing to provide the input to its own U.S. partner on a timely basis. A foreign carrier also could degrade the quality of the input provided to U.S. rivals to such an extent that, in conjunction with its U.S. partner, it could price higher quality services at monopoly rates. In addition, a foreign carrier and its U.S. affiliate could engage in a predatory strategy — known as a price squeeze — to drive its U.S. rivals from the market.[278] Given these concerns, we are not persuaded by those commenters that argue we should rely on general antitrust law to protect competition and consumers in the U.S. market from anticompetitive behavior.[279] Rather, we agree with our tentative conclusion in the *Notice* that effective, narrowly tailored safeguards are necessary to prevent such harms to competition and consumers in U.S. markets.[280]

147. As we stated in the *International Services Order*, "foreign market power . . . can be abused with or without a U.S. affiliate."[281] In the increasingly global telecommunications market, unaffiliated entities may enter alliances that offer each other favorable treatment. As we discuss below, however, we find that a vertically integrated carrier or an ownership affiliation between a U.S. and a foreign carrier creates a heightened ability and incentive to engage in anticompetitive behavior. The regulatory framework we adopt, therefore, contains general safeguards that apply to all U.S. carriers' dealings with foreign carriers, as well as additional safeguards that apply to dealings between affiliated or merged carriers, where a heightened risk of anticompetitive conduct exists because of carriers' increased ability and incentive to engage in such behavior.

148. We believe that greater liberalization in foreign markets is the long-term solution to the risk that foreign market power may be leveraged into the U.S. market to the detriment of competition and U.S. consumers.[282] As countries fulfill their commitments to the WTO Basic Telecom Agreement, new entrants will make inroads into formerly monopolized markets and consumers will benefit from innovative services and price competition. We fully expect that, as competitive conditions improve in foreign markets, the need for some of our safeguards will diminish. We note that when market conditions preclude foreign carriers from leveraging market power to affect competition adversely in

[278] *See BT/MCI Merger Order* ¶¶ 159-162. A price squeeze is a tactic by which a carrier with a foreign affiliate sets its prices for end-user services below the level of its imputed costs when providing service on an affiliated route because the price of an essential input, the settlement rate charged by its affiliate, is above the economic cost incurred by the foreign affiliate to provide international termination. *See infra* ¶ 192.

[279] *See, e.g.*, Telstra Reply Comments at 10; FT Comments at 11.

[280] *See Notice* ¶ 89.

[281] *International Services Order*, 7 FCC Rcd at 7332 ¶ 6.

[282] *See id.* at 7332 ¶ 6; *see also Foreign Carrier Entry Order*, 11 FCC Rcd at 3880 ¶ 16 (stating that "full facilities-based competition on the foreign end of a U.S. international route is ultimately the most potent safeguard against anticompetitive effects from the entry of a foreign carrier in the U.S. international services market").

the U.S. market, we may further modify our safeguards. We already have in place a policy that permits alternative settlement arrangements where market conditions so permit.[283]

149. Commenters do not dispute our fundamental premise that market power on the foreign end of a U.S. international route — if unrestrained — could be leveraged into the U.S. market to the detriment of competition and U.S. consumers. To the extent that they disagree with the regulatory framework we adopt or the specific safeguards we apply, we address their concerns below. We conclude, however, that the competitive safeguards we adopt here are necessary to restrain the leveraging of foreign market power into the U.S. market and that they will do so without imposing overly burdensome regulation.

B. General Obligations on All U.S. International Carriers

1. "No Special Concessions" Rule

Background

150. In the *Foreign Carrier Entry Order*, we stated that the No Special Concessions rule prohibits all U.S. international carriers from agreeing to accept special concessions from any foreign carrier or administration.[284] We noted that we would entertain requests to waive the provision where the U.S. carrier could demonstrate that the foreign carrier granting the concession "lacks the ability to leverage control over bottleneck services or facilities into the U.S. international services market."[285] We also stated that we would revisit our approach to regulating exclusive arrangements as foreign markets eliminated restrictions to entry and adopted competitive safeguards.[286] In the *Notice*, we observed that the WTO Basic Telecom Agreement is expected to open markets to competition throughout the world.[287] As a result, we proposed to apply the No Special Concessions rule in more targeted circumstances.

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[283] *See Regulation of International Accounting Rates*, CC Docket No. 90-337, Phase II, Fourth Report and Order, 11 FCC Rcd 20,063, FCC 96-459 (1996) (*Flexibility Order*); *see also infra* Section V.E.

[284] *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3971-72 ¶ 257. Section 63.14 of the Commission's rules prohibits a U.S. international carrier from agreeing to accept special concessions directly or indirectly from any foreign carrier with respect to traffic or revenue flows. *See* 47 C.F.R. § 63.14. A "special concession" is defined as "any arrangement that affects traffic or revenue flows to or from the United States that is offered exclusively by a foreign carrier or administration to a particular carrier and not also to similarly situated U.S. international carriers authorized to serve a particular route." *Id.* § 63.18(i)(1).

[285] *Foreign Carrier Entry Order*, 11 FCC Rcd at 3972 ¶ 258.

[286] *See id.* at 3971-72 ¶ 257.

[287] *See Notice* ¶ 115.

151. We tentatively concluded in the *Notice* that the No Special Concessions rule should be narrowed to prohibit exclusive arrangements only between a U.S. carrier and a foreign carrier that has market power on the foreign end of a U.S. international route.[288] We sought comment on whether a "bright-line" test exists that could identify a class of foreign carriers that do not raise market power concerns. Alternatively, we sought comment on whether to permit exclusive deals where the foreign carrier has market power in a country that has eliminated barriers to international facilities-based entry and licensed multiple international facilities-based carriers.

152. We also proposed to give greater specificity to the No Special Concessions rule by identifying the types of conduct that are prohibited. We requested comment on our proposal, as well as how to implement it in circumstances where the Commission has not made a specific market power determination for a particular foreign carrier.[289]

Positions of the Parties

153. The commenters are divided over our proposal to limit the rule to special concessions granted by a foreign carrier with market power. AT&T and New T&T Hong Kong support the proposal.[290] Several other commenters, however, contend that applying the rule to dealings with any foreign carrier that has market power in the destination country would be too broad.[291] NTT contends that the rule should be imposed only as a remedy to address proven anticompetitive conduct.[292] Sprint argues that the rule should not be modified because the WTO Basic Telecom Agreement does not implicate it.[293]

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[288] *See id.*

[289] *See id.* ¶¶ 116-117.

[290] *See* AT&T Comments at 46; AT&T Reply Comments at 33; New T&T Hong Kong Comments at 4.

[291] *See, e.g.*, BTNA Comments at 5 (arguing that the rule should apply only to dealings between U.S.-licensed carriers and their foreign affiliates that hold a monopoly position in the provision of international facilities); MCI Comments at 6 (arguing that the rule should apply only to dealings with foreign carriers that do not face facilities-based competition); DT Comments at 28-29 (arguing that it is unnecessary to impose the rule on dealings with carriers from WTO Member countries and that the rule should apply only to dealings with foreign carriers that do not face multiple facilities-based competitors); FT Comments at 21 (arguing that the Commission should not use a market power test for carriers from countries that allow competition and have committed to the WTO Basic Telecom Agreement's Reference Paper).

[292] *See* NTT Reply Comments at 4.

[293] *See* Sprint Comments at 28.

154. In addition, some commenters assert that a market power threshold for application of the rule would be administratively burdensome.[294] GTE asserts that any market power determinations should not include a review of market share.[295] Deutsche Telekom argues that the Commission should specify the factors it will examine in making foreign market power determinations.[296] New T&T Hong Kong asserts that market power determinations should be based on U.S. antitrust law.[297] AT&T, which supports using a market power threshold, states that it cannot identify a bright-line test to distinguish carriers that possess market power from those that do not.[298] MCI and BTNA suggest that the bright-line test should be whether facilities-based competition exists on the foreign end.[299]

155. No commenters oppose our proposal to delineate the types of conduct prohibited by the rule. New T&T Hong Kong supports the proposal.[300] AT&T recommends that the rule be expanded to prohibit acceptance of exclusive arrangements involving "*any service* . . . affecting traffic or revenue flow to or from the United States" including, but not limited to, those arrangements identified in the *Notice*.[301] In contrast, MCI and Telmex assert that elements of the proposal may be overly restrictive.[302]

Discussion

156. The No Special Concessions rule currently prohibits all U.S. carriers from entering into exclusive arrangements with any foreign carrier affecting traffic or revenue flows to or from the United States.[303] The Commission has recognized, however, that special concessions granted by a foreign carrier can serve the public interest in appropriate circumstances.[304] Such arrangements, for example, may involve innovative services or operational efficiencies that reduce the rates for U.S.

[294] *See* Telstra Reply Comments at 5; Sprint Comments at 29.

[295] *See* GTE Comments at 12.

[296] *See* DT Comments at 27.

[297] *See* New T&T Hong Kong Comments at 2.

[298] *See* AT&T Comments at 46 n.77.

[299] *See* MCI Comments at 8; BTNA Comments at 5 n.6.

[300] *See* New T&T Hong Kong Comments at 4.

[301] AT&T Comments at 46 (emphasis in original); *see also* AT&T Reply Comments at 33 n.53.

[302] *See* MCI Reply Comments at 4 n.7; Telmex Comments at 5 n.13.

[303] *See* 47 C.F.R. § 63.14.

[304] *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3971-72 ¶¶ 257-258.

international services or increase the quality of such services. We adopt a policy here that narrows our No Special Concessions rule in a way that will encourage such arrangements, provided they do not result in an unacceptable risk of harm to competition and consumers in the U.S. international services market. To strike an appropriate balance, we modify the rule so that it only prohibits U.S. carriers from agreeing to accept special concessions granted by foreign carriers that possess market power in a relevant market on the foreign end of a U.S. international route.[305]

157. Our competitive safeguards framework is intended to prevent the leveraging of foreign market power into the U.S. international services market.[306] In particular, we are concerned that an exclusive vertical arrangement between a foreign carrier with market power on the foreign end and a U.S. carrier (whether through ownership affiliation or contractual arrangement) could result in harm to competition and consumers in the U.S. market.[307] If a foreign carrier with market power were to enter into an exclusive arrangement, competing carriers on the foreign end, if any exist, might not have sufficient capacity to accommodate rival U.S. carriers' needs. Such an arrangement, therefore, could limit rival U.S. carriers' ability to provide international services, raise these carriers' costs of termination, or degrade the quality of their service offerings, to the ultimate harm of U.S. consumers.

158. By contrast, it is unlikely that an exclusive deal involving a foreign carrier that lacks market power would result in harm to competition and consumers in the U.S. market. Because the foreign carrier cannot restrict the supply of those services or facilities necessary for the provision of U.S. international services to such a degree as to raise prices, it cannot effectively leverage its market power into the U.S. market. A special concession granted by such a carrier would not unreasonably limit rival U.S. carriers' ability to provide international services. A special concession, moreover, generally would not raise U.S. rivals' costs or degrade their services. Such arrangements, therefore, would not raise competitive concerns. We thus adopt our proposal to limit the No Special Concessions rule to dealings between U.S. carriers and foreign carriers that possess market power in a relevant market on the foreign end of an international route.[308]

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305 For a discussion of market power and relevant markets, see *supra* ¶¶ 144-145.

306 *See supra* Section V.A.

307 A vertical arrangement involves a relationship between two markets that can be thought of as vertically related, in the sense that one market provides an input to the other. *See BT/MCI Merger Order* ¶ 16 n.21.

308 The rule we adopt here does not alter the International Settlements Policy (ISP) or our policy governing alternative settlement arrangements, see *infra* Section V.E. We reiterate our earlier finding that alternative settlement arrangements "create an exception to our [N]o [S]pecial [C]oncessions rule." *Flexibility Order*, 11 FCC Rcd at 20,084 ¶ 51. We note, however, that the competitive safeguards we adopted in the *Flexibility Order* continue to apply to any alternative settlement arrangement. *See infra* ¶ 308.

159. We agree with several commenters, however, that contend that determinations of market power on the foreign end of an international route can involve extensive analysis.[309] We therefore sought comment in the *Notice* on whether a "bright-line" test exists to identify a class of foreign carriers that do not raise market power concerns. The record in this proceeding contains little input with regard to a bright-line test. MCI and BTNA suggest that we impose the rule on dealings with foreign carriers that do not face facilities-based competition.[310] We find, however, that foreign carriers with market power may retain the ability to engage in discriminatory behavior long after the entry of new competitors.

160. We nonetheless find that identifying a class of foreign carriers that are not subject to the No Special Concessions rule will reduce the need for parties to file petitions for declaratory ruling to determine whether it is permissible to enter into an exclusive arrangement with a particular foreign carrier. We agree with the comments of U S WEST that the rules we adopt should "enable carriers to establish quickly and accurately what international transactions, services, and practices are permissible."[311] We therefore conclude that identifying a class of foreign carriers that presumptively lack market power on the foreign end will provide U.S. carriers with greater certainty and expediency as they negotiate with their foreign counterparts. Any presumption should only identify a category of foreign carriers that, as a general matter, lack the ability to leverage foreign market power into the U.S. market. Any classification, moreover, should serve only as a rebuttable presumption.

161. Based on these objectives, we adopt a rebuttable presumption that foreign carriers with less than 50 percent market share in each relevant market on the foreign end lack sufficient market power to affect competition adversely in the U.S. market.[312] We recognize that market share is but one factor in a traditional market power analysis.[313] A firm's control of available capacity on a particular route, for example, is an important component of any market power determination. On balance, however, we find that market share data is more readily available and will serve as a sufficient approximation of foreign market power for purposes of satisfying our rebuttable presumption. As the authors of the 1997 edition of the American Bar Association Antitrust Law Developments publication recently concluded, "[c]ourts virtually never find monopoly power when

[309] *See, e.g.*, Sprint Comments at 21, 29; Telstra Reply Comments at 5.

[310] *See* MCI Comments at 8; BTNA Comments at 5 n.6.

[311] U S WEST Comments at 8.

[312] As note above, the relevant markets on the foreign end of a U.S. international route generally include: international transport facilities or services, including cable landing station access and backhaul facilities; inter-city facilities or services; and local access facilities or services on the foreign end. *See supra* ¶ 145.

[313] Indeed, as we have stated with regard to market power analyses pertaining to dominant carrier status, a finding "cannot be made in scientifically precise terms. No factor by itself is determinative. Rather, it is necessary to determine if a firm has the ability to control prices." *International Competitive Carrier Order*, 102 FCC 2d at 830 ¶ 42.

market share is less than about 50 percent."[314] We conclude, therefore, that for purposes of applying our competitive safeguards, we will create a rebuttable presumption that a foreign carrier with less than 50 percent market share in each of the relevant markets on the foreign end of a U.S. international route lacks sufficient market power to affect competition adversely in the U.S. market. In doing so, we decline to adopt GTE's generalized assertion that market share should not be considered in any market power determination.[315] We adopt a presumption to allow U.S. carriers to accept special concessions granted by foreign carriers that possess less than 50 percent market share in each relevant market on the foreign end without first obtaining specific approval from the Commission.

162. We emphasize that the presumption we adopt here is rebuttable. While we require no prior approval, we note here that under Section 43.51 of our rules, U.S. carriers are required to file with the Commission contracts, operating agreements, and other arrangements with foreign carriers that involve, among other things, the exchange of services and the interchange or routing of traffic.[316]

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[314] A.B.A. Section of Antitrust Law, *Antitrust Law Developments* at 235-236 (4th ed.) (1997); *see also id.* at 236 n.41 (citing, *inter alia*, cases holding that market share below 50 percent is insufficient to evidence market power, including *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406, 1411 (7th Cir. 1995) ("Fifty percent is below any accepted benchmark for inferring monopoly power from market share"), *cert denied*, 116 S. Ct. 1288 (1996); *U.S. Anchor Mfg., Inc. v. Rule Indus. Inc.*, 7 F.3d 986, 1000 (11th Cir. 1993) ("we have discovered no cases in which a court found the existence of actual monopoly established by a bare majority share of the market"); *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 512 F.2d 1264, 1274 (9th Cir. 1975) (indicating that fifty percent market share is insufficient); *Cliff Food Stores v. Kroger, Inc.*, 417 F.2d 203, 207 n.2 (5th Cir. 1969) (indicating that "something more than 50% of the market is a prerequisite to a finding of monopoly"); *Re/Max Int'l, Inc. v. Realty One, Inc.*, 924 F. Supp. 1474, 1490-95 (N.D. Ohio 1996) (39 percent to 51 percent market shares insufficient); *Advanced Health-Care Servs., Inc. v. Giles Mem'l Hosp.*, 846 F. Supp. 488, 493-94 & n.9 (W.D. Va. 1994) (absent extraordinary circumstances, market share over 50 percent is required to show market power); *AT&T v. Delta Communs. Corp.*, 408 F. Supp. 1075, 1106 (S.D. Miss. 1976) (less than 50 percent market share insufficient), *district court opinion adopted and aff'd per curiam*, 579 F.2d 972 (5th Cir. 1978), *modified on other grounds*, 590 F.2d 100, *cert. denied*, 444 U.S. 926 (1979)). While other courts have held that higher levels of market share are insufficient to infer market power, *see, e.g.*, *Fineman v. Armstrong World Indus.*, 980 F.2d 171, 201 (3d Cir. 1992) ("As a matter of law, absent other relevant factors, a 55 percent market share will not prove the existence of monopoly power."), *cert. denied*, 507 U.S. 921 (1993), the authors of the A.B.A. Antit. Law Devs. observe that "the greatest uncertainty exists when market shares are between 50 percent and 70 percent." *Antitrust Law Developments* at 236.

[315] *See* GTE Comments at 12. GTE argues that a foreign carrier may have a large market share because the market is too small to support competitors or because competitors may "not immediately be able to challenge that market share for reasons unrelated to actions of the incumbent." *Id.* While true, these assertions do not warrant a finding that market share should be disregarded in a market power analysis. To the contrary, case law on this issue lends support to our rebuttable presumption that foreign carriers with less than 50 percent market share in each relevant input market lack the ability to leverage market power into the U.S. market. *See supra* note 314.

[316] 47 C.F.R. § 43.51.

These agreements must be filed with the Commission within 30 days of execution and are routinely available for public review. The Commission and carriers, therefore, have the ability to examine these agreements. We will entertain petitions for declaratory ruling that demonstrate that a foreign carrier with less than 50 percent market share has the ability -- either unilaterally or in concert with other carriers -- to affect competition adversely in the U.S. market. If we find that a U.S. carrier has entered into an agreement that violates the No Special Concessions rule, the U.S. carrier will be required to terminate the arrangement or modify it to conform with our policies. We also will entertain petitions for declaratory ruling that demonstrate that a foreign carrier with a market share of 50 percent or more in any relevant market should be allowed to grant a special concession because it lacks the ability to affect competition adversely in the U.S. market. We will review these petitions under an appropriate economic analysis of market power.[317]

163. If a U.S. carrier seeks to use the under-50 percent market share presumption as the basis to accept a special concession from a foreign carrier, it must file data with the Commission to substantiate that claim for the relevant input markets on the foreign end of the international route.[318]

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[317] *See supra* note 266. In previous decisions, our market power analysis has considered: (1) the foreign affiliate's market share in any relevant terminating market on the foreign end of the particular route; (2) the supply elasticity of the market; (3) the demand elasticity of that market's customers; and (4) the foreign affiliate's cost structure, size and resources. *See, e.g., IDC America, Inc., Application Pursuant to Section 214 of the Communications Act of 1934, as amended, to Provide Non-interconnected International Private Line Service between the United States and Japan*, Order, Authorization and Certificate, DA 97-571, File No. ITC-96-685, ¶ 4 (Int'l Bur., Tel. Div. rel. Mar. 21, 1997) (citing *Motion of AT&T Corp. to be Declared Non-dominant for International Service*, Order, FCC 96-209, ¶¶ 37-79 (rel. May 14, 1996), *recon. pending*; *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3293-94 (1995)); *see also Merger Guidelines*, 4 Trade Reg. Rep. (CCH) at 20,570. In evaluating market power, the Commission has recognized that neither market share, by itself, nor lower costs, sheer size, superior resources, financial strength, and technical capability, by themselves, confer market power. Indeed, consistent with well accepted economic principles, market conditions related to demand and supply elasticities are the more crucial determinants of a firm's market power. These conditions include the availability of close demand substitutes and ease of entry and expansion.

[318] In the international services market, the U.S. carrier may use the following data to make its market share showing: the percentage of the foreign carrier's foreign-billed minutes or, if unavailable, foreign-billed revenues on the relevant U.S. international route. In circumstances where the foreign carrier provides local exchange or exchange access service, the U.S. carrier may rely on the percentage of access lines provided by the foreign carrier in its franchise area and the percentage of all access lines in the nation that the franchise area represents. We find, as a general matter, that it is unlikely that a carrier would possess market power in the inter-city input market if it did not have market power in either the international transport or the local exchange or local access input markets. For purposes of the presumption, we therefore will not require a showing that the foreign carrier has less than 50 percent market share in the inter-city market. In addition, carriers may rely on the fact that the foreign carrier neither owns nor controls facilities in a relevant market on the foreign end of the international route. We note that participation in the U.S. market by foreign carriers that do not own or control telecommunications facilities in the foreign market is unlikely to raise market power concerns. *See, e.g.*,

This material should be included in the U.S. carrier's Section 43.51 filing of the contract or agreement in question.[319] The U.S. carrier should rely on data compiled by regulatory authorities in the destination market or by international bodies. If such data is unavailable, the carrier may rely on information from industry sources, including the foreign carrier itself, supported by an affidavit from a representative of the U.S. carrier that the information relied upon is true and correct to the best of the representative's knowledge and belief. We reiterate that our market share screen serves only as a presumption that may be rebutted by a full-fledged analysis of the foreign carrier's market power in the relevant market on the foreign end.

164. We also tentatively concluded in the *Notice* that it would be beneficial to delineate the types of exclusive arrangements that the No Special Concessions rule prohibits. We proposed that the rule should prohibit any special concessions not offered to similarly situated U.S. carriers involving: (1) operating agreements for the provision of basic services; (2) distribution or interconnection arrangements, including pricing, technical specifications, functional capabilities, or other quality and operational characteristics, such as provisioning and maintenance times; (3) any information, prior to public disclosure, about a foreign carrier's basic network services that affects either the provision of basic or enhanced services or interconnection to the foreign country's domestic network by U.S. carriers or their U.S. customers; (4) any proprietary or confidential information obtained by the foreign carrier from competing U.S. carriers in the course of regular business activities with such U.S. carriers, unless specific permission has been obtained in writing from the U.S. carrier involved; and (5) arrangements for the joint handling of basic U.S. traffic originating or terminating in third countries.[320]

165. As an initial matter, we decline to adopt AT&T's proposal that the rule cover all types of services affecting traffic or revenue flows to or from the United States, including, but not limited to, those arrangements identified in the *Notice*.[321] AT&T's proposal would include non-basic telecommunications services, and is far broader than necessary. We conclude that our No Special Concessions rule should be limited to exclusive dealings involving services, facilities, or functions on the foreign end of a U.S. international route that are necessary for the provision of basic telecommunications service. Anticompetitive conduct involving these input markets, we conclude, can lead to harm to competition and consumers in the U.S. international services market. We find, moreover, that the record supports a narrower scope for the No Special Concessions rule than was proposed in the *Notice*. We conclude that the No Special Concessions rule should be limited in scope to prohibit any U.S. carrier from agreeing to accept from a foreign carrier with market power any

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KDD America, Inc., Application for Authority under Section 214 of the Communications Act of 1934, as amended, to Resell Non-interconnected Private Line Services Between the United States and Various International Points, Order, Authorization and Certificate, 11 FCC Rcd 10,828, 10,830 ¶ 7 (Int'l Bur. 1996).

[319] *See* 47 C.F.R. § 43.51.

[320] *See Notice* ¶ 117.

[321] *See* AT&T Comments at 46.

special concession not offered to similarly situated U.S.-licensed carriers involving: (1) operating agreements for the provision of basic services; (2) distribution arrangements or interconnection arrangements, including pricing, technical specifications, functional capabilities, or other quality and operational characteristics, such as provisioning and maintenance times; and (3) any information, prior to public disclosure, about a foreign carrier's basic network services that affects either the provision of basic or enhanced services or interconnection to the foreign country's domestic network by U.S. carriers or their U.S. customers.

166. We have decided not to adopt the proposal to specify a prohibition on special concessions involving the joint handling of basic U.S. traffic originating or terminating in third countries. We conclude that in this case specifying "joint handling" could well result in less, rather than more, clarity with respect to our No Special Concession rule. MCI, for example, is concerned that the No Special Concessions ban could be construed to prohibit switched hubbing.[322] This was not our intent in proposing the joint handling prohibition. We thus decline to specify a ban on exclusive arrangements involving the joint handling of basic U.S. traffic originating or terminating in third countries. We also decline to include in the No Special Concessions rule a specific prohibition on the receipt of proprietary or confidential information of a competing U.S. carrier obtained by a foreign carrier with market power. Instead, we address the confidentiality of competing carrier information more broadly below.[323]

167. In response to Telmex's claim that the No Special Concessions rule would prohibit "one-stop shopping," we clarify that the rule does not prevent a U.S. carrier and a foreign carrier from offering end-to-end services. It does, however, prohibit U.S. carriers from entering into exclusive arrangements with certain carriers for certain services. For example, a U.S. carrier cannot agree to enter an *exclusive* "one-stop shopping" arrangement in which the U.S. carrier acts as an agent on behalf of its U.S. customers in obtaining private line service from a foreign carrier with market power, where the foreign carrier refuses to recognize other U.S. carriers as agents. This type of exclusive arrangement would preclude competing U.S. carriers from serving an important segment of the U.S. international services market.

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[322] *See* MCI Reply Comments at 4 n.7. Our "switched hubbing" rule, 47 C.F.R. § 63.17(b), permits a U.S. carrier to route U.S.-outbound switched traffic over U.S. international private lines that terminate in equivalent countries, and then to forward that traffic to a third, non-equivalent country by taking at published rates and reselling the IMTS of a carrier in the equivalent country. The rule also permits U.S. carriers to route U.S.-inbound switched traffic in a similar manner. *See id.* We take this opportunity to reaffirm our switched hubbing rule, a rule that requires nondiscriminatory treatment and therefore addresses our concern regarding preferential arrangements between a U.S. carrier and a foreign carrier in the routing of traffic to or from third countries. *See generally Implementation and Scope of the International Settlements Policy for Parallel Routes*, CC Docket No. 85-204, Report and Order, 51 Fed. Reg. 4736 (Feb. 7, 1986) (*ISP Order*), *modified in part on recon.*, 2 FCC Rcd 1118 (1987) (*ISP Reconsideration*), *further recon.*, 3 FCC Rcd 1614 (1988); *see also Regulation of International Accounting Rates*, 6 FCC Rcd 3552 (1991), *on recon.*, 7 FCC Rcd 8049 (1992).

[323] *See infra* Section V.B.2.a.

168. For the reasons discussed below, we are not persuaded by commenters' claims that applying the No Special Concessions rule to dealings with foreign carriers that possess market power would continue to impose restrictions on too many arrangements between U.S. carriers and foreign carriers. In particular, these commenters argue that use of market power as a threshold standard is too broad. Deutsche Telekom argues that the proposal would "stifle the development of innovative service and pricing arrangements to the detriment of U.S. consumers."[324] MCI claims that it could standardize all arrangements and inhibit the development of new services.[325] We disagree. As an initial matter, we find that the rule will encourage innovative services by providing U.S. carriers with a presumption that they may engage in exclusive arrangements with a well-defined class of foreign carriers. As we observed in the *Notice*, the WTO Basic Telecom Agreement is expected to result in the introduction of competition on the foreign end of major U.S. international routes.[326] New entrants in these markets, who will lack market power as a general matter, will offer U.S. international carriers more opportunities to enter into such arrangements. In contrast to Sprint's assertions, we therefore find that the WTO Basic Telecom Agreement warrants a review of the No Special Concessions rule. Moreover, the No Special Concessions rule allows U.S. carriers to enter into "non-standardized arrangements" with all foreign carriers -- including those that possess market power, provided that the same terms and conditions are available to other similarly situated U.S. carriers. In addition, our *Flexibility Order* allows U.S. carriers to enter into alternative settlement arrangements with any foreign carrier, subject to certain competitive safeguards[327] and our determination that the arrangement is consistent with our policy objectives.[328]

169. We find, moreover, that several commenters' specific proposals to limit the rule would not be sufficient to prevent exclusive arrangements that create an unacceptable risk of harm to competition and consumers in the U.S. international services market. NTT, for example, contends that, given the reporting requirements proposed in the *Notice*, the Commission should only impose the No Special Concessions rule as a remedial measure to address proven anticompetitive conduct.[329] We

324 DT Comments at 28.

325 *See* MCI Comments at 7.

326 *See Notice* ¶ 115.

327 To ensure that our flexibility policy does not have anticompetitive effects in the international market, we adopted the following safeguards: (i) alternative settlement arrangements between affiliated carriers and those involved in non-equity joint ventures affecting the provision of basic services must be filed with the Commission and be publicly available; and (ii) alternative arrangements affecting more than 25 percent of either the inbound or outbound traffic on a particular route must be filed with the Commission and be publicly available and must not contain unreasonably discriminatory terms and conditions. *See Flexibility Order*, 11 FCC Rcd at 20,061-63 ¶¶ 45, 48. We will continue to apply these competitive safeguards to alternative settlement arrangements. *See infra* Section V.E.

328 *See Flexibility Order*, 11 FCC Rcd at 20,087-88 ¶ 59.

329 *See* NTT Reply Comments at 4.

agree with NTT's underlying premise that the reporting requirements we adopt below will serve to deter, monitor, and detect anticompetitive behavior in the U.S. international services market.[330] We also generally support a commitment to remedial measures rather than proscriptive safeguards, where feasible, as a means to reduce regulatory intervention in the market. For these reasons, we narrow the No Special Concessions rule to allow U.S. carriers to enter into exclusive arrangements where they are in the public interest. Where a significant risk of anticompetitive behavior exists, however, we find that targeted proscriptive restrictions such as the No Special Concessions rule are necessary.

170. We are not persuaded by other commenters' proposals to narrow application of the rule to arrangements with a class of foreign carriers more limited than those with market power. BTNA argues that we should adopt the rule as a supplemental safeguard, applicable only to dealings between U.S.-licensed carriers and their foreign affiliates that do not face international facilities-based competition.[331] Similarly, MCI argues that the rule should apply only to dealings between U.S.-licensed carriers and any foreign carriers that do not face international facilities-based competition. Deutsche Telekom and Telstra assert that the No Special Concessions rule should apply only to dealings with carriers from non-WTO Member countries. France Telecom claims that we should allow U.S. carriers to accept special concessions from foreign carriers, regardless of their market power on the foreign end, as long as the foreign country allows competition and has committed to the Reference Paper.[332] With regard to BTNA's claim, we note that unaffiliated carriers, as well as affiliated carriers, have incentives to enter into exclusive arrangements involving services and facilities on the foreign end that are necessary for the provision of U.S. international services. A threshold standard tied to affiliation, therefore, would not address many exclusive deals that raise substantial competitiveness concerns. More broadly, we do not adopt these proposals because, as AT&T notes, they "ignore[] the continued ability of incumbents with market power to engage in discriminatory behavior long after the entry of new competitors."[333] Regardless of the number of competitors in a foreign market or a country's commitment to liberalization, exclusive arrangements with foreign carriers that have market power may result in harm to competition and consumers in the U.S. market. We note, however, that we will entertain petitions for alternative settlement arrangements consistent with our flexibility policy.[334] We will also consider other petitions asserting that an otherwise prohibited exclusive arrangement is in the public interest and should be allowed.

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330 *See infra* Section V.C.2.b.(iv)-(vi).

331 *See* BTNA Comments at 5; *see also* DT Comments at 28-29.

332 *See* FT Comments at 21.

333 AT&T Reply Comments at 34.

334 *See infra* Section V.E.